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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 225

THE ANDREW JERGENS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 561-573) is reported at 175 F. 2d 130. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 103-114) are reported in 76 N. L. R. B. 363.

JURISDICTION

The decree of the court below (R. 574-578) was entered on May 17, 1949. The Company's petition

for rehearing was denied on June 24, 1949 (R. 578). The petition for a writ of certiorari was filed on July 30, 1949. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, where the employer seeks to have a case remanded to the Board to take evidence that the union with which the Board has ordered it to bargain no longer retains as members a majority of the employees in the unit, the court may, without remanding the case, itself apply the Board's known and established policy of attributing such a loss of majority to the employer's unfair labor practices and enforce the Board's order.

2. Whether the Board's findings of fact are supported by substantial evidence on the record as a whole.

The following additional questions are urged by the Company, but we believe that they are not presented by the record in this case:

3. Whether the court below improperly refused to review the findings of the Board, and went beyond those findings to devise findings of its own and base its decision thereon.

4. Whether a unilateral grant of a wage increase constitutes an independent refusal to bargain within the meaning of Section 8 (5) of the Act,

where the wage increase was within the limits of that previously negotiated and the impasse arose with respect to union security only.

5. Whether a Board order requiring the Company to bargain with a union, where the Company was found to have refused to bargain in good faith on the issue of union security, may be enforced without a specific provision that the Company is required to bargain with respect to union security only in the event that the Union shall have won a union-security referendum as provided for in Section 8 (a) (3) of the Act, as amended.

6. Whether a Board order, requiring the Company to cease from refusing to bargain collectively, from unilaterally changing wages, and from in any other manner interfering with the efforts of the union to bargain collectively, and, as affirmative action, to bargain collectively with the union upon request and to post appropriate notices, may be enforced without modification, where the Board found that the Company refused to bargain collectively in good faith, in violation of Section 8 (5) of the Act, and that the Company's unilateral grant of a wage increase constituted an independent refusal to bargain within the meaning of Section 8 (5).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*), and of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. II,

141, *et seq.*), are set forth in the Appendix, *infra*, pp. 25-33.

STATEMENT

Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on February 26, 1948, issued its findings of fact, conclusions of law, and order (R. 103-114). On March 16, 1948, the Board issued an order correcting its decision and order (R. 115). The pertinent facts, as found by the Board, may be summarized as follows:[1]

The Company, an Ohio corporation, with its principal place of business at Cincinnati, owns and operates a plant at Burbank, California, where it is engaged in the manufacture and sale of toilet articles, cosmetics, and related products (R. 21; 524, 525). On January 4, 1946, after an election held pursuant to the Board's direction of election, the General Warehousemen's Union, Local 598, of the Teamsters, Chauffeurs, Warehousemen, and Helpers, A. F. L., herein called the Teamsters (referred to by the Company in its petition as the Union) was certified by the Board as the collective bargaining representative of the production and maintenance employees of the Company at its Burbank plant (R. 23; 17, 18).

By letter dated January 9, 1946, the Teamsters requested the Company to begin immediate negotiations for a contract (R. 24; 171, 172, 467). A meet-

[1] In the following statement, the references preceding the semi-colon are to the Board's findings; the references following the semi-colon are to the supporting evidence.

ing was held on January 17, 1946, and was attended by Attorney Stevenson and Business Representative Davis for the Teamsters and by Attorneys Mergenthaler and Powers and certain plant officials for the Company (R. 105; 172, 173, 264, 265, 418, 419). This was the only formal meeting held between the Teamsters and the Company (R. 24; 301).

Negotiations were conducted by discussing and comparing the standard contract used by the Teamsters with a contract which the Company had negotiated in 1942 with an earlier union, the Soap and Cosmetic Workers Union, Local 21,361, A.F.L., but later refused to execute on the ground that the Cosmetic Workers did not represent a majority of its employees (R. 24, 25, 107; 174-175, 265-267, 385-392, 466, 468-474). The Teamsters and the Company negotiated on seniority, the standard day, the standard week, the shift rate, holidays, vacations, grievance procedures, and other issues; and many of the provisions in the Teamsters' contract were agreed to as corrected (R. 26; 177, 385-392). However, apart from a request by the Teamsters for the payment of a five-cents-an-hour wage increase, retroactive to February 1, 1943, which had been recommended by the National War Labor Board in a directive issued May 29, 1944, to which the Company and the Cosmetic Workers were parties, there were no negotiations with respect to wages (R. 25; 175, 196, 197, 266). Davis testified that no wage proposals were made to the Company (R. 175). Stevenson testified that wages were dis-

cussed only to the degree that "we agreed that there wouldn't be any great problem with the wage structure . . . But to that degree, no specific wages were set" (R. 274, 275). The testimony of both Davis and Stevenson was corroborated by Powers, a Company witness, who testified that wage schedules were not discussed at all and that Stevenson said nothing about wages except that they were not a present issue (R. 393).

When the meeting came to the union security clause of the Teamsters' proposed contract, Stevenson advised the Company that some form of union security would be necessary, but at the same time expressed his willingness to compromise with respect to the Teamsters' uniform practice of insisting upon a closed shop. He offered various alternatives to the closed shop, such as maintenance of membership, preferential hiring, and other modified forms, and then asked the Company's representatives to make some sort of proposal with respect to union security. (R. 27, 28, 105; 175, 179, 181, 273, 274, 280, 293, 455.) Mergenthaler, however, replied that the Company had always been opposed to union security, in any form, that he had no authority to negotiate with respect to union security, and that he would first have to obtain authority from the Company's national officers in Cincinnati, Ohio, before he could talk about or discuss union security with the Teamsters (R. 25, 27, 36, 105; 266, 267, 274, 281).

Mergenthaler also declared that the Company was barred by the War Labor Board's directive of May 29, 1944, from negotiating on union security with the Teamsters, inasmuch as the directive recommended that the Company grant maintenance of membership to the Cosmetic Workers (R. 107; 180, 181, 267, 268, 422, 465). Stevenson replied that the directive was no longer effective with respect to maintenance of membership for the Cosmetic Workers since the Teamsters had been designated and certified by the National Labor Relations Board as the exclusive bargaining representative of the Company's employees, and that, hence, there was no reason why the Company should not negotiate with the Teamsters on union security (R. 28; 181, 267, 268, 275, 277). The parties then agreed to adjourn the meeting until the Company's representatives obtained authority to negotiate with the Teamsters on union security. Mergenthaler promised Stevenson that the Company would advise the Teamsters of its position on union security within a week. (R. 105; 268, 281, 405.)

Several weeks passed, however, and the Teamsters, despite repeated calls by Stevenson to Mergenthaler and to various plant officials, had received no answer to its request for union security. The Teamsters then told the Company that if it did not attempt to negotiate sincerely by February 18, 1946, the Teamsters would resort to economic

pressure, including a strike and boycott. (R. 105; 301, 302, 458-462.) The Company began immediately to prepare for the threatened strike and boycott by increasing the daily production quota and by ordering the employees to work overtime on Saturday, February 16, and Sunday, February 17 (R. 106, n. 3; 226, 232, 234, 243). The Teamsters learned of these preparations, and ordered a strike which began Saturday morning, February 16 (R. 106, n. 3; 227, 228, 321-324). That same morning, according to his undenied testimony, John McGee, secretary-treasurer of the Teamsters, met Rothenberg, the Company's vice-president in charge of the Burbank plant, at the gate of the plant, and told him that "if he saw fit to sit down and negotiate with us * * * I would be there at any time it was all right with him." Rothenberg replied: "All right. Thank you," but never contacted McGee (R. 106; 323-325).

On February 17, the day after the strike began, the Teamsters received a letter, dated February 15, 1946, from Mergenthaler, (R. 106; 270, 487, 488), in which after discussing the War Labor Board's directive of May 29, 1944, he stated:

> I have taken up with the company the question of whether or not it would agree to a term in the contract which we have been negotiating looking to union security for the Teamsters' Union. The company finds itself unable to come to a decision upon this point

> until the above-mentioned order of the War Labor Board is revoked or disposed of in some other manner so as not to cause the company embarrassment in the future. My client is, however, ready and willing to continue negotiations as to other phases of the proposed contract.

Upon receiving the letter, Stevenson phoned Mergenthaler, and told him that "the position taken in the letter with respect to the failure to bargain until the War Labor Board had revoked or disposed of their order was an impossible situation, that insofar as I knew * * * the War Labor Board was not in existence and that I had offered at all times in discussing this case with Mr. Neary [an attorney for the company] to do anything within the union's power to assist them in clarifying the atmosphere so that we could go ahead with recognition, negotiations, and a contract" (R. 106; 107; 270, 271). The Company has at no time since writing the foregoing letter altered its position as set forth therein, nor has it expressed any willingness to negotiate with the Teamsters on the issue of union security (R. 42, 43; 462-464).

Effective July 1, 1946, during the height of the strike, the Company granted its employees a general wage increase of approximately 15 percent, which amounted to about 18 cents an hour (R. 38, 39; 247, 248, 491, 492). The Company stipulated at the hearing that, subsequent to February 16, 1947, there had been no negotiations between it

and the Teamsters relative to or concerning wages (R. 368). The Teamsters' strike was still in progress at the time of the hearing before the Board (R. 415-416).

Upon the basis of the foregoing facts and the entire record, the Board found that the Company, from the very outset, entered into negotiations with a fixed determination not to grant union security provisions or even to discuss them with the Teamsters, and that the Company had not acted in good faith in advancing the War Labor Board's directive as a ground for refusing to negotiate with respect to union security (R. 107-109). The Board pointed out that the Cosmetic Workers had become defunct before the Teamsters was certified, that the Company had refused to comply with the War Labor Board directive on the ground that the Cosmetic Workers did not represent a majority of its employees and that the Company's reliance upon the War Labor Board directive as a bar to negotiation of union security issues with the Teamsters was inconsistent with its willingness to negotiate other issues with the Teamsters inasmuch as that directive would be equally applicable to the execution of any kind of a contract with the Teamsters (R. 107-108). The Board rejected the contention of the Company that the Teamsters also failed to meet its statutory obligation by allegedly refusing to continue negotiations on other phases of the proposed contract until the matter of union security could be resolved. It held that, under the

circumstances, the Teamsters' insistence upon the Company bargaining with respect to union security did not impose a condition precedent upon negotiation of other terms of the proposed contract, and that the Teamsters' conduct did not absolve the Company of its own refusal to bargain collectively. (R. 109.) The Board, therefore, determined that the Company refused, on and after January 17, 1946, to bargain in good faith with the Teamsters within the meaning of Section 8 (5) of the Act (R. 109, 110).

The Board further found that the wage increase of July 1, 1946 had been granted unilaterally without prior consultation or negotiation with the Teamsters (R. 38-39, 47, 110). It, therefore, determined that the granting of the wage increase constituted an independent refusal to bargain within the meaning of Section 8 (5) of the Act (R. 47, 110). The Board concluded that by the aforesaid acts the Company had engaged and is engaging in unfair labor practices within the meaning of Section 8 (5) and 8 (1) of the Act (R. 49, 50).[2] Accordingly, it ordered the Company to cease and desist from refusing to bargain collectively with the Teamsters, from unilaterally changing wages of employees in the unit without prior negotiation with the Teamsters, and from in any other manner interfering with the

[2] The same provisions are continued in Section 8 (a) (5) and 8 (a) (1) of the Act, as amended by the Labor Management Relations Act of 1947. There is no difference between the original Act and the amended Act in this respect.

efforts of the Teamsters to bargain collectively with the Teamsters upon request, and to post an appropriate notice (R. 111-113).

The Board filed a petition for enforcement of its order in the court below on September 23, 1948 (R. 116-122). In its answer to the Board's petition, the Company alleged, *inter alia*, that as of that time none of its employees were members of the Teamsters (R. 127). The Board admitted the truth of this allegation in its brief in the court below.[3] In its answer and its brief in the court below, the Company also challenged the propriety of requiring it to bargain with the Teamsters respecting union security in view of the provisions of the Labor Management Relations Act requiring a union authorization election prior to the signing of such contracts (R. 127).

On May 17, 1949, the court handed down its opinion (R. 561-573), and entered its decree enforcing in full and without modification the Board's order (R. 574-578). With respect to the Teamsters' loss of majority, the court held that since it occurred subsequent to the Company's unfair labor practices, the loss must be attributed to the unfair labor practices (R. 567-570). The court further held that the Board's failure to consider the Teamsters' loss of majority and to make a

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[3] Brief for the National Labor Relations Board in the court below, p. 20, n. 21. A true copy of this brief has been lodged with the Clerk of this Court for the convenience of this Court.

finding as to its cause was immaterial in view of the Board's "known and established policy" of refusing to attempt to disentangle the consequences of an employer's unfair labor practice and of assuming that a loss of majority was due to prior unfair labor practices (R. 568-569). Accordingly, the court refused to remand the case to the Board for findings on the matter (R. 569, 570). With respect to the failure of the order to provide that the employer must bargain about union security only if the employees authorize the union so to bargain in an election as required by the Labor Management Relations Act, the court held the order must be construed as contemplating such compliance by the Teamsters with the Labor Management Relations Act (R. 566).

ARGUMENT

1. The Company's contention that the court below erred in enforcing the order to bargain with the Teamsters irrespective of whether the Teamsters at present has any membership among employees in the unit is based upon petitioner's view that the Board has no established policy respecting the effect of a union's loss of majority membership in such situations (Pet. 11). However, the Board has uniformly held that any loss of majority membership by a union subsequent to unfair labor practices is to be attributed to the unfair labor practices. *Matter of Karp Metal Products, Inc.*, 51 N. L. R. B. 621, 624-626. This Court has expressly

approved this Board policy.[4] The court below viewed this policy as so well "established and known" that the courts should themselves, without a remand to the Board, apply it in situations, such as this, where the facts respecting the loss of majority were not before the Board because they occurred subsequent to the close of the hearing (R. 566-570). As the court pointed out, a remand in this case would be "useless," since the order already entered by the Board is the same as the order it would devise if it had the new facts before it (R. 569-570). Other courts of appeal have similarly regarded a remand in such cases as unnecessary and have themselves applied the Board's policy respecting the effect of a loss of majority.[5] And this Court, in a like situation, has said: "It is obvious that the Board would apply such a policy to this case, thereby making a remand to the Board a mere formality and a needless addition to an already over-prolonged proceeding." *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation,* 331 U. S. 416, 431.

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[4] *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512; *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702; *National Labor Relations Board* v. *Bradford Dyeing Ass'n.*, 310 U. S. 318, 339-340; *Int'l. Ass'n. of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82.

[5] *National Labor Relations Board* v. *Swift & Co.*, 162 F. 2d 575 (C.A. 3), certiorari denied, 332 U.S. 791; *National Labor Relations Board* v. *Central Dispensary & Emergency Hospital*, 145 F. 2d 852 (C.A. D.C.), certiorari denied, 324 U.S. 847; *National Labor Relations Board* v. *Arnolt Motor Co.* (C.A. 7), decided March 9, 1949. Cf. *Great Southern Trucking Co.* v. *National Labor Relations Board*, 127 F. 2d 180 (C.A. 4), certiorari denied, 317 U.S. 652.

The Company cites (Pet. 21), as being in conflict with the decision below, *National Labor Relations Board* v. *Inter-City Advertising Co.,* 154 F. 2d 244 (C.A. 4); *National Labor Relations Board* v. *Goodyear Tire & Rubber Co.,* 129 F. 2d 661 (C.A. 5); *Stewart Die Casting Corp.* v. *National Labor Relations Board,* 114 F. 2d 849, 858-859 (C.A. 7), certiorari denied, 312 U. S. 680; *National Labor Relations Board* v. *American Mfg. Co.,* 106 F. 2d 61, 68-69 (C.A. 2), modified and affirmed, 309 U. S. 629; *National Labor Relations Board* v. *National Licorice Co.,* 104 F. 2d 655 (C.A. 2), modified on other grounds, 309 U. S. 350; and *National Labor Relations Board* v. *Maurice Eanet* (C.A.D.C.), decided September 27, 1948. In the *Inter-City* case, the only unfair labor practice found by the Board was one committed by the employer solely to enable it to test the validity of the Board's determination of an appropriate unit. In that circumstance, there being no evidence or finding, as here, of hostility to the Act or violations beyond that calculated to make judicial review possible, the court felt itself free to find "no room for the presumption * * * that the decline in union membership was due to the employer's refusal to bargain". 154 F. 2d at 247. Certainly, the Board's application of its "established and known" policy in the *Inter-City* situation confirms the conviction of the court below that a remand could only lead, *a fortiori,* to application of this policy to the stronger facts of this case.

That the *Inter-City* case rests on its "peculiar facts" is apparent from the Fourth Circuit's recent decision in *National Labor Relations Board* v. *Norfolk Shipbuilding & Drydock Co.*, 172 F. 2d 813, which squarely supports the decision below. The *Goodyear* case did not involve any bargaining order. The *American Mfg.*, *National Licorice*, and *Stewart* cases were decided prior to, and do not reflect, the decisions of this Court in the *Lorillard* and *Frank Bros.* cases, and, hence, are inapplicable here. The decision of the court in the *Eanet* case was vacated and the case set down for rehearing by order of the court. The decision below clearly does not present a conflict with other decisions.

The other cases cited by the Company in its argument on this point merely state that an administrative agency must explain the reason for its holdings.[6] However, as has been noted, this Court has made it clear that a court may itself apply without remand to the administrative agency, a policy the rationale for which has been fully set forth in prior decisions of the administrative agency. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416, 428-429.

2. The only other question which we believe is presented by the petition is whether there is sub-

[6] *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177; *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80; *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, relied on by the Company (Pet. 11, 12, 13, 15, 21, 26, 30, 38, 40, 42).

stantial evidence to support the Board's findings of fact. This presents no question warranting review by this Court. Moreover, as the evidence set forth in the Statement (*supra,* pp. 4-10) shows, the Board's findings were fully supported by the record.

3. The Company's contention that the court below improperly refused to review the findings of the Board is based on the assumption that the court below ignored the Labor Management Relations Act of 1947 in deciding this case (Pet. 31-34).

A reading of the decision below, however, discloses that the court did in fact deal with the applicability of the 1947 amendments to the Act. Thus, the court, in reviewing the Board's order requiring the Company to bargain with the Teamsters, specifically considered the applicability of the 1947 amendments to Section 8 (3) (R. 566) and to Section 9 (c) (R. 569) of the Act. Moreover, contrary to the Company's allegation (Pet. 32), the court, in ruling that the trial examiner applied correct principles of law in excluding evidence, implicitly considered the applicability of the 1947 amendment to Section 10 (b) of the Act. The clear import of the Court's language (R. 573) is that the trial examiner's rulings on the admission of evidence were correct, even if the rules of evidence were deemed applicable, as provided for by the amended Act. The other instances, alleged by the Company, of the court's failure to determine the applicability of the 1947 amendments,

likewise, do not establish the Company's contention. That the court declined (Pet. 31, 32) to weigh the testimony of one witness on an issue of fact against the testimony of several witnesses in conflict, and that the court referred (Pet. 32) in its opinion to "substantial evidence" and not to "substantial evidence on the record considered as a whole" do not indicate that the applicability of the 1947 amendments was not dealt with by the court.

The Company further alleges (Pet. 34, 35) that the court below assumed the following facts, which the Company claims are not contained in the record:

> A union called the Cosmetic Workers had been certified bargaining agent for respondent's [Company's] employees subsequent to December 23, 1941. It had negotiated unsuccessfully with respondent for approximately one year, after which time it finally agreed to the Company's terms in an effort to obtain a contract. However, the Company then refused to bargain with the Cosmetic Workers on the ground that they no longer represented a majority of the employees. The question, along with a wage increase issue, was certified to the War Labor Board, and the directive of May 29, 1944, issued. Respondent refused to comply with any of its terms. Thereafter, the Cosmetic Workers Union, apparently discredited in its attempt to achieve effective recognition, affiliated with the Teamsters on July 1, 1945. (R. 563, 564)

The foregoing facts are to be found in the earlier representation case (*Matter of Andrew Jergens Company,* 64 N. L. R. B. 989, 990-991), which the Board, in accordance with Section 9 (d) of the Act, certified to the court below as part of the record in this case (R. 1, 2).

The Company also alleges (Pet. 35) that the court devised a finding of its own, when it referred to "respondent's continued efforts to circumvent the effect of the Teamsters' certification." The Board, however, made the equivalent finding when it found that the Company refused on and after January 17, 1946, to bargain in good faith with the Teamsters, and that the Company unilaterally granted a wage increase without prior consultation with the Teamsters (R. 109, 110). The Company makes the same allegation (Pet. 36, 37) with respect to the court's statement that the Company's delay in sending the letter of February 15, 1946, in reply to the Teamsters' request for the position of the Company on union security, may reasonably be attributed to "stalling" tactics by the Company. The Board, however, in discussing the position taken by the Company in its letter, found that the Company was refusing "by dilatory conduct" to come to a decision on union security (R. 46, 47). There are, moreover, findings by the Board that the Teamsters made repeated efforts to obtain an answer from the Company, and that, when these failed, the Teamsters resorted to strike activity to compel an answer (R. 105, 106). Hence the

court's statement cannot be said to be an independent finding beyond the findings of the Board.

The Company further alleges (Pet. 38, 39) that the court, in reviewing the Board's determination that the Company's unilateral grant of a wage increase constituted an independent refusal to bargain, substituted its own ground of liability for that of the Board. The opinion below shows that the court recited the Board's finding that the wage increase constituted an independent refusal to bargain, held that the finding was supported by substantial evidence, and, rejecting the Company's contention, explained why under the circumstances unilateral action was not justified (R. 570, 571). The Company claims that the court's statement that "the unilateral wage increase may be said to have been in furtherance of" the refusal to bargain on union security (R. 571), is a deviation from the Board's finding that the wage increase constituted an independent refusal to bargain. There is clearly no merit to such a contention.

The Company makes the same allegation (Pet. 39) with respect to the review by the court of the Board's determination that the War Labor Board's directive was not a legal bar to collective bargaining with the Teamsters. The opinion below shows that the court, after noting that the directive was, as of the January 17, 1946 meeting, inapplicable by its own terms, and further that it was at most advisory and was not enforceable by legal

process, held that the "directive furnished no legitimate basis or justifiable reason for respondent's refusal to bargain" (R. 565). The Board had found (R. 108, n. 6) that the "directive did not constitute a legal bar to negotiations" with the Teamsters, after noting that, as of the January 17, 1946 meeting, the directive "was for all purposes a nullity" inasmuch as the War Labor Board had adopted the policy of not applying sanctions in the event of non-compliance (R. 44). It cannot be said then that the court disagreed with or deviated from the grounds upon which the Board based its determination.

4. The Company's question number "4", "Is a general wage increase granted five months after the strike in an amount not exceeding that negotiated with the union, a refusal to bargain, when wages had been fully negotiated and the impasse arose with respect to union security alone?" (Pet. 9), is not properly before this Court. The Board found, and the court below sustained its finding, that the wage increase granted had never been negotiated upon between the Company and the Teamsters (R. 38-39, 47, 110, 570-572). Indeed no witness testified that the Company and the Teamsters at any time discussed a 15 percent increase.

5. The Company's question number "1", "May the petitioner be ordered to bargain on the issue of union security without provision for an election in compliance with Section 8 (a) (3) of the Act, as amended?" (Pet. 9) is not before this Court.

The Board conceded in the court below that the order did not require the Company to bargain with the Teamsters concerning union security until the Teamsters won a union security election conducted by the Board in accordance with the provisions of Section 8 (a) (3) of the Act as amended.[7] The court below adopted the same view and expressly so stated in its decision (R. 566).

6. The Company's question numbered "7", "Where no unfair labor practice is found other than refusal to bargain as to union security and grant of a unilateral wage increase, may an order to bargain with respect to rates of pay, wages, hours and other conditions of employment, to take affirmative action and to cease and desist from interfering in any manner with the efforts of the union to bargain, be enforced without modification?" (Pet. 10), is, likewise, not properly before this Court. The Company in its exceptions to the trial examiner's intermediate report included no challenge to the breadth of the recommended order (R. 50-52), which the Board subsequently adopted as its own without relevant change (R. 110-113). Section 10 (e) of the Act precludes consideration by a court of an objection that has not been urged before the Board. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385. Nor was this question argued or even mentioned in the Company's brief filed in the court below. Moreover,

[7] Brief for the National Labor Relations Board in the court below, p. 31.

there is no merit to the Company's contention (Pet. 54) that the decision of the court below to enforce the Board's order without modification conflicts with the decisions of the Court in *National Labor Relations Board* v. *Crompton-Highland Mills,* 337 U. S. 217, and in *National Labor Relations Board* v. *Express Publishing Company,* 312 U. S. 426.

In the *Crompton-Highland* case, this Court restricted the scope of the Board's order to remedying the unfair labor practice found, namely, a unilateral grant of a wage increase constituting a refusal to bargain, on the ground that there were no other findings by the Board that established a lack of good faith or lack of consistency with the principles of collective bargaining on the part of the employer. However, in this case, the Board did find that the Company generally refused to bargain collectively in good faith with the Teamsters, as well as that the Company's unilateral grant of a wage increase constituted an independent refusal to bargain (R. 108, 109). The Board further found that the Company had acted in bad faith in advancing the War Labor Board's directive as a ground for refusing to bargain on union security (R. 107, 108), a ground which the Company continues to advance. The Board's order is in full accord with the principles established by this Court in the *Express Publishing* case (312 U. S., at 436, 437). Hence, even if the Company's question were properly before this Court, it would not justify further review.

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents neither a conflict of decision nor any new or novel questions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER, 1949.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

Sec. 10. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person

resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

2. The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are as follows:

* * * * *

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

"Sec. 8 (a). It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employ-

ment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement * * *

* * * * *

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

* * * * *

"SEC. 9. * * *

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative de-

fined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

"(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. * * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint * * *. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the

opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *

* * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), * * *, within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and

thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its

recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)."

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